(2)

Supreme Court, U.S.
FILED
JUL 21 1993
OFFICE OF THE CLERK

No. 92-1791

In the Supreme Court of the United States

OCTOBER TERM, 1993

LLOYD EDWIN HUMPHREYS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

MICHAEL L. PAUP
Acting Assistant Attorney General

ROBERT E. LINDSAY
ALAN HECHTKOPF
JANET KAY JONES
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the presence of a convicted felon on the jury automatically requires a new trial.

2. Whether the warrant-authorized searches of petitioner's office were lawful.

3. Whether the district court properly declined to consider petitioner's untimely motion for a change of venue under 18 U.S.C. 3237(b).

4. Whether petitioner had adequate notice that he might be convicted of the lesser included offense of filing a false return for the 1985 tax year.

5. Whether the district court properly instructed the jury on the element of willfulness.

6. Whether petitioner was entitled to add loan guarantees to his adjusted basis in the stock of a Subchapter S corporation.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	16

TABLE OF AUTHORITIES

Cases:

Brown v. *Commissioner*, 706 F.2d 755 (6th Cir. 1983)	15
Cheek v. *United States*, 498 U.S. 192 (1991)	13
Estate of Leavitt v. *Commissioner*, 875 F.2d 420 (4th Cir.), cert. denied, 493 U.S. 958 (1989)	15
Franks v. *Delaware*, 438 U.S. 154 (1978)	5
Harris v. *United States*, 902 F.2d 439 (5th Cir. 1990)	15
Illinois v. *Gates*, 462 U.S. 213 (1983)	9-10
McDonough Power Equipment, Inc. v. *Greenwood*, 464 U.S. 548 (1984)	8
Sansone v. *United States*, 380 U.S. 343 (1965)	12
Schmuck v. *United States*, 489 U.S. 705 (1989)	6, 13
Selfe v. *United States*, 778 F.2d 769 (11th Cir. 1985)	15
United States v. *Boney*, 977 F.2d 624 (D.C. Cir. 1992)	7, 8, 9
United States v. *Caceres*, 440 U.S. 741 (1979)	11
United States v. *Currie*, 609 F.2d 1193 (6th Cir. 1979), cert. denied, 445 U.S. 928 (1980)	7
United States v. *Doe*, 465 U.S. 605 (1984)	10
United States v. *Olano*, 113 S. Ct. 1770 (1993)	9
United States v. *Uribe*, 890 F.2d 554 (1st Cir. 1989)	7, 9

Statutes and rules:

Jury Selection and Service Act of 1968, 28 U.S.C. 1861 *et seq.*:	
28 U.S.C. 1865	7, 8, 9
28 U.S.C. 1865(a)	8

Statutes and rules—Continued: Page

28 U.S.C. 1865(b) 7
28 U.S.C. 1867 8
28 U.S.C. 1867(a) 8
18 U.S.C. 3237(b) 6, 11, 12
26 U.S.C. 7201 ..... 2, 12
26 U.S.C. 7207 ..... 2, 4, 6, 12, 13
42 U.S.C. 2000aa-11 11
42 U.S.C. 2000aa-12 11
Fed. R. Crim. P.:
Rule 41(c) 10
Rule 41(d) 10
Rule 41(e) 10-11

Miscellaneous:

Tax Div., Dep't of Justice, Directive 52 (1986) 11

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-1791

LLOYD EDWIN HUMPHREYS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 4-18) is reported at 982 F.2d 254.

JURISDICTION

The judgment of the court of appeals was entered on December 7, 1992. A petition for rehearing was denied on January 21, 1993. Pet. App. 19. The petition for a writ of certiorari was filed on April 21, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Iowa, petitioner was convicted on four counts of willful tax evasion, in violation of 26 U.S.C. 7201, and on one count of willfully filing a false tax return, in violation of 26 U.S.C. 7207. Petitioner was sentenced to 24 months in prison, to be followed by three years of supervised release, and was fined $10,007.84.

1. a. Petitioner was an attorney in Cedar Rapids, Iowa. An Internal Revenue Service (IRS) investigation revealed that for the 1983, 1984, and 1985 tax years, petitioner failed to report (1) certain legal fees received in trade or undeposited cash and (2) other fees that were processed through an unreported escrow account. Several former clients testified at trial that petitioner specifically requested payment in cash and that petitioner "pocketed" cash payments tendered to him at his office. One of petitioner's employees testified that petitioner had instructed her to give him any cash received from clients. Gov't C.A. Br. 3-4.

Petitioner stipulated at trial that he had received nearly $80,000 in unreported legal fees for the tax years 1983-1985. Petitioner claimed that he had relied upon his tax preparers and had a good faith belief that his tax returns were accurate.[1] Petitioner's accountant, however, testified that his understanding was that all of the law firm's receipts were deposited in the firm's bank account. The accountant also testified that he was unaware that petitioner had, in

[1] Petitioner had unreported income of $13,168 in 1983; $63,604 in 1984; and $18,649 in 1985. Gov't C.A. Br. 3.

addition, kept currency receipt books and maintained an escrow account. Gov't C.A. Br. 5.

b. Petitioner also failed to pay certain taxes arising from his sale of stock in Institutional Energy Management (IEM), a subchapter S corporation. In 1981 petitioner handled the incorporation of IEM and became its vice president and secretary. In exchange for his legal services, petitioner received 25% of IEM's stock. On several occasions, petitioner made loans to IEM, and IEM repaid them with interest. Petitioner also guaranteed three Small Business Administration (SBA) loans to IEM. IEM repaid those loans in 1985 and 1987. Gov't C.A. Br. 6.

In 1988 petitioner agreed to sell his IEM stock back to the company for $102,000. He received a $10,000 downpayment. The balance of the principal and interest was paid in monthly installments of $2,200 until 1991. On its Form 1099 reports, IEM reported interest payments to petitioner. Although petitioner reported the interest payments on his 1988 and 1989 tax returns, he did not report the payment of his principal. The failure to do so resulted in tax underpayments of $7,813 for 1988 and $3,810 for 1989. Gov't C.A. Br. 6-7.

At trial, petitioner admitted that he had reported only the interest payments that IEM had reported to the IRS. Petitioner testified that he believed that the SBA loan guarantees gave him a basis in the stock, eliminated any gain from his sale of stock, and negated any need to report the principal payments. Petitioner, however, never gave his accountant any information concerning his sale of the stock or his basis in the stock. He also failed to inform the accountant of the initial $10,000 payment or the

subsequent $2,200 monthly payments. Gov't C.A. Br. 7-8.

2. Petitioner filed a pretrial motion to suppress evidence seized from his office during a search conducted by IRS agents. After an evidentiary hearing, the district court rejected petitioner's claims that the supporting affidavits lacked sufficient allegations of substantial underreporting; that the affidavits contained false statements or omissions warranting suppression; and that agents improperly seized privileged attorney-client documents and exceeded the scope of the warrants. 7/3/91 Order 6, 15-26. The court also rejected petitioner's motion to transfer the counts relating to his 1988 and 1989 taxes to the Northern District of Texas for trial. Gov't C.A. Br. 1; Pet. App. 12-15.

At the close of the evidence, petitioner moved for a judgment of acquittal. Finding the evidence insufficient to convict petitioner of tax evasion for the 1985 tax year, the district court instructed the jury that for that year it could consider only the lesser included offense of filing a false tax return, in violation of 26 U.S.C. 7207. The court rejected petitioner's contention that he had insufficient notice to defend properly against the lesser included offense. Gov't C.A. Br. 2, 43-44.

After his conviction, petitioner moved for a new trial. He claimed that he had been denied the right to a trial by a qualified jury because one of the jurors had been convicted of a felony 30 years earlier and had never had his civil rights restored. After an evidentiary hearing, the trial court found that the juror had a good faith belief that his civil rights had been restored and that there was no evidence supporting petitioner's allegations of bias or

prejudice. The court added that petitioner's failure to explore the issue until after the verdict undercut his allegation that he had been denied a fair trial. 12/3/91 Order 5-8.[2]

3. The court of appeals affirmed. Pet. App. 1-18. The court rejected petitioner's challenge to the sufficiency of the affidavits underlying the search warrants. The court noted that the affidavits showed "that cash receipts from clients were not being deposited to [petitioner's] business account, that his tax preparer relied solely upon the deposit records, and that former employees were instructed by [petitioner] to give him all cash." *Id.* at 7-8. Accordingly, the court found that the magistrate had a "substantial basis" for finding probable cause "based upon a totality of circumstances." *Id.* at 8. And after reviewing the magistrate's detailed findings concerning petitioner's allegations of false and misleading statements, the court held that the district court had not committed clear error in rejecting petitioner's suppression motion under *Franks* v. *Delaware*, 438 U.S. 154 (1978). Finally, the court of appeals found that "nothing more than speculation and contradictory statements" had been offered to support petitioner's claim that the government seized privileged attorney-client documents. Pet. App. 9-10.

The court of appeals rejected petitioner's argument that the district court should have severed and transferred the counts relating to the 1988 and 1989 tax years. The court of appeals noted that the

---

[2] The court also rejected petitioner's claim that it was error to instruct the jury on a lesser included offense with regard to the 1985 tax year and his renewed claim that the evidence was insufficient to sustain his convictions. See 12/3/91 Order 9-10.

evidence relating to the 1983-1985 counts and 1988-1989 counts would have been "mutually admissible" in separate trials to show petitioner's motive, intent, and pattern of criminal behavior. Pet. App. 10-12. The court also sustained the trial court's refusal to transfer the 1988 and 1989 charges to the Northern District of Texas under 18 U.S.C. 3237(b), which provides that a defendant may elect trial in his home district when the venue in another district is based solely on a mailing to the IRS. Because venue was based in part on petitioner's commission of an offense in the Northern District of Iowa, the court found Section 3237(b) inapplicable. Pet. App. 12-14.

The court of appeals declined to adopt petitioner's per se rule that any conviction by a jury including a felon must be set aside. Rather, it held that the district court properly rejected petitioner's motion for a new trial because petitioner had not acted "diligently and timely [to] discover the relevant information" and he had not shown that seating the juror resulted in "bias or unfairness." Pet. App. 16. The court emphasized that the juror in question had a good faith belief that his civil rights had been restored and did not fear retaliation from the government if he voted for acquittal. *Id.* at 14.

Finally, the court of appeals held that the district court properly submitted a lesser included offense to the jury with respect to petitioner's 1985 tax return. Relying on *Schmuck* v. *United States*, 489 U.S. 705 (1989), the court held that petitioner had received adequate notice that he might be convicted of the lesser included offense of filing a false return under Section 7207 when he was charged with tax evasion. The court also concluded that the instructions as a whole fairly and adequately informed the jury of the

applicable law relating to willfulness and intent. Pet. App. 17.

ARGUMENT

1. Petitioner contends (Pet. 13-18) that the district court erred in not granting him a new trial under 28 U.S.C. 1865(b) because one of the jurors was a convicted felon whose civil rights had not been restored.

Section 1865(b) does not require a new trial in this case. The statute provides that a prospective juror is ineligible to sit if he "has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored." 28 U.S.C. 1865(b).[3] But the inclusion of a convicted felon on a jury panel does not require automatic reversal of a conviction. Rather, if the court seats a disqualified juror based on erroneous information supplied by the juror, the defendant is entitled to a new trial only if he can show bias or prejudice as a result of the juror's participation. See *United States* v. *Boney*, 977 F.2d 624, 633 (D.C. Cir. 1992); *United States* v. *Uribe*, 890 F.2d 554, 562 (1st Cir. 1989); *United States* v. *Currie*, 609 F.2d 1193, 1194 (6th Cir. 1979), cert. denied, 445 U.S. 928 (1980).

After an evidentiary hearing, the district court found that no such bias or prejudice tainted the verdict in this case. The court found that the juror in question, Floyd Heskett, failed to indicate that his civil rights had not been restored because he had a

---

[3] Section 1865(b) is part of the Jury Selection and Service Act of 1968, 28 U.S.C. 1861 *et seq.*, which prescribes the procedures by which a district court is to administer the jury selection process.

mistaken but good faith belief that his rights had in fact been restored. 12/3/91 Order 2, 5. Moreover, Heskett testified that his previous conviction did not affect his deliberations and that he had not feared that he would be subject to government reprisal if he voted to acquit petitioner. *Id.* at 3. After determining that Heskett retained his good faith belief that his civil rights had been restored until after the jury's verdict had been rendered, the district court properly concluded that there was "no evidence that [he] was anything but a fair and impartial juror." *Id.* at 7; see Pet. App. 14-16.[4]

In addition, the Jury Selection and Service Act of 1968, 28 U.S.C. 1867, prescribes the "exclusive means" by which a defendant may challenge a jury on grounds of noncompliance with Section 1865(a). See *Boney*, 977 F.2d at 633. Section 1867(a) requires the defendant to assert claims of noncompliance with Section 1865 "before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence,

---

[4] This Court has held that a new trial is not warranted merely because a juror has given a mistaken but honest response during voir dire. *McDonough Power Equipment, Inc.* v. *Greenwood*, 464 U.S. 548, 555-556 (1984). As the Court explained, a juror may give an erroneous answer during voir dire for various reasons, but "only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial." *Id.* at 556. Here, the district court found, and the court of appeals affirmed, that juror Heskett's response was an honest, good faith mistake and that no bias or prejudice resulted from his seating. Although the *Greenwood* case was a civil case, there is no reason its principles should not be equally applicable in the criminal context.

the grounds therefor, whichever is earlier."[5] In this case, petitioner did not explore Heskett's assertion concerning the restoration of his civil rights during the voir dire examination or at any time until after the jury had rendered a conviction. See 12/3/91 Order 5-6. Accordingly, the court of appeals correctly held in the alternative that petitioner's failure "diligently and timely [to] discover the relevant information" foreclosed his challenge to the verdict under Section 1865.[6] Pet. App. 16; See *Boney*, 977 F.2d at 632-633; *Uribe*, 890 F.2d at 561.

2. Petitioner renews his challenge to the sufficiency of the warrant-authorized searches of his office. Pet. 20-23.

Both courts below correctly rejected petitioner's contention that the affidavits supporting the two search warrants were insufficient to establish probable cause. First, the affidavits demonstrated that petitioner was not reporting all his cash income; that he was not depositing all of his clients' cash payments into his business account; that he instructed his tax preparer to base his tax returns exclusively upon the deposit records; and that he instructed his employees to give him all cash receipts, which he secreted in his desk or safe. Pet. App. 7-8. Accordingly, applying the "totality-of-the-circumstances analysis," *Illinois* v. *Gates*, 462 U.S.

[5] Petitioner's contention (Pet. 17) that the participation of an unqualified juror constitutes plain error warranting automatic reversal is unfounded. See *United States* v. *Olano*, 113 S. Ct. 1770 (1993).

[6] The district court did not find that petitioner had waived his right to object to Heskett's seating, but found that his tardiness in asserting an objection undercut petitioner's claim that he was denied a fair trial. 12/3/91 Order 6.

213, 238 (1983), the court of appeals correctly sustained the district court's and magistrate's conclusion that probable cause existed.

Petitioner also renews his contention (Pet. 20-22) that the searches violated his attorney-client privilege. However, both courts below found that petitioner failed to satisfy his burden of showing that the searches reached privileged materials. Pet. App. 9-10; 7/3/91 Order 24-25. "[Petitioner] provided nothing more than speculation and contradictory statements. No files or documents were produced for the review of the district court, and no objection was made during the trial on the grounds that evidence introduced was illegally obtained." Pet. App. 10. Petitioner's fact-intensive attack upon findings in which both courts below concurred does not merit further review. See *United States* v. *Doe*, 465 U.S. 605, 613-614 (1984).[7]

Finally, petitioner errs in contending (Pet. 20) that the seizure and retention of his computer for more than ten days violated Fed. R. Crim. P. 41(c). Rule 41(c) requires, in relevant part, only that a warrant be executed within ten days after its issuance; it does not address the period in which seized property may be retained or the manner in which it must be returned. Other provisions address the procedures for handling seized property, but prescribe no specific period in which it must be returned. See Fed. R. Crim. P. 41(d) (receipt and inventory of seized

---

[7] Nor does petitioner's conclusory assertion (Pet. 20) that the search of his computer tapes exceeded the scope of the warrant. As the district court correctly found, the "seizure of the entire computer and its memory files was necessitated by the practicalities of the circumstances" and "[o]nly the relevant memory files were examined." 7/3/91 Order 26.

property required) and 41(e) (motion for return of property).[8]

3. Petitioner argues (Pet. 28) that he was improperly denied the right to a change of venue under 18 U.S.C. 3237(b). Section 3237(b) provides that "where venue for prosecution of an offense described in section 7201 * * * is based solely on a mailing to the Internal Revenue Service," a defendant may elect to be tried in the district in which he was residing at the time of the offense. For two reasons, the court of appeals properly rejected petitioner's claim that that provision entitled him to a change of venue from the Northern District of Iowa to the Northern District of Texas.

First, Section 3237(b) provides that a motion to transfer must be filed "within twenty days after arraignment of the defendant upon indictment or

---

[8] Petitioner's claim that the searches violated Tax Division, Department of Justice, Directive 52 (1986) (Pet. App. 1-3) was not raised in the court of appeals until petitioner's reply brief, and it was not addressed by the court of appeals. Hence, that issue is not before this Court. Moreover, at least in the absence of a claim of bad faith, petitioner cannot invoke the exclusionary rule to redress an agency's failure to follow internal guidelines that are not required by a statute or the Constitution. See *United States* v. *Caceres*, 440 U.S. 741 (1979). Contrary to petitioner's claim (Pet. 21), Directive 52 is not required by 42 U.S.C. 2000aa-11; Directive 52 governs authorization to search targets of an investigation, whereas Section 2000aa-11 governs searches of third parties. Even if Directive 52 had been issued pursuant to Section 2000aa-11, 42 U.S.C. 2000aa-12 specifically provides that "an issue relating to the compliance, or the failure to comply, with guidelines issued pursuant to this subchapter may not be litigated, and a court may not entertain such an issue as the basis for the suppression or exclusion of evidence."

information." Because petitioner did not move to transfer this action to the Northern District of Texas for 99 days after his arraignment (Gov't C.A. Br. 30), the lower courts correctly found petitioner's venue motion was untimely. See Pet. App. 13.

Second, as the court of appeals concluded, petitioner was not entitled to a change of venue under Section 3237(b) in any case. Petitioner sought to transfer Counts 4 and 5 of the indictment, which relate to the tax returns for 1988 and 1989. Those counts alleged that petitioner committed his offenses "by preparing and causing to be prepared and by signing and causing to be signed" false tax returns. Gov't C.A. Br. 33. Those returns were prepared and signed by tax preparers in the Northern District of Iowa, and venue was established based on that activity. Pet. App. 13. Because Section 3237(b) may be invoked when venue is premised "solely" upon the mailing of a tax return from the district in which the indictment is filed, petitioner was ineligible for a change of venue under that provision. Moreover, the returns were mailed not from the Northern District of Iowa, but from the Northern District of Texas. See Pet. 28. Accordingly, venue in the Northern District of Iowa was not based at all on a mailing from that district.

4. Petitioner claims (Pet. 24-25) that the district court erred in reducing the charge relating to the 1985 tax year from tax evasion (26 U.S.C. 7201) to the lesser included offense of filing a false return (26 U.S.C. 7207). In *Sansone* v. *United States*, 380 U.S. 343, 352-353 (1965), this Court held that the offense of willful tax evasion under Section 7201 may encompass a lesser included offense of filing a false return under Section 7207. In the district court, petitioner did not contest that Section 7207 is a lesser included offense

of Section 7201 (Gov't C.A. Br. 43-44), but argued that he had not been afforded sufficient notice to defend against the charge under Section 7207. That contention, which petitioner renews here (Pet. 25), is foreclosed by *Schmuck* v. *United States*, 489 U.S. 705, 718 (1989), where the court held that the charge of a greater offense provides a defendant with adequate notice that he may be convicted of a lesser included offense. In the absence of any conflict in authority, further review is unwarranted.

5. Petitioner argues (Pet. 25-28) that the jury was not adequately instructed on the element of willfulness under *Cheek* v. *United States*, 498 U.S. 192 (1991).

To satisfy the element of "willfulness" in a tax prosecution, the government must prove "that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty." *Cheek*, 498 U.S. at 201. In so doing, the government must negate the defendant's claim that "he had a good-faith belief that he was not violating any of the provisions of the tax laws." *Id.* at 202.

In this case, the district court's lengthy instruction on willfulness fully complied with the requirements of *Cheek*. The court instructed the jury in pertinent part as follows:

> The element of willfulness requires the government to prove beyond a reasonable doubt that the law imposed a duty upon the defendant to report all taxable income, that the defendant knew of this duty, and that the defendant voluntarily and intentionally violated that duty. For the government to carry this burden, the government

> must negate by proof beyond a reasonable doubt, the defendant's claim that he had a good faith belief that he was not violating the tax laws, either because he honestly believed the returns to be complete and accurate, or because he was relying on returns prepared by accountants to whom he had furnished all relevant information. Defendant's conduct is not willful if he was merely negligent, inadvertent, or mistaken. If a person in good faith believes that an income tax return truthfully reports his taxable income under the internal revenue laws, that person cannot be guilty of willfully attempting to evade or defeat income tax or willfully filing a false income tax return. You are further instructed that a good faith belief that one is not violating the income tax laws can arise from a misunderstanding of the law. You are further instructed that the asserted good faith belief does not have to be objectively reasonable as long as it is an honest belief held in good faith.

Jury Instruction No. 8 (filed Aug. 16, 1991). The court of appeals was correct (Pet. App. 17) that the charge in this case "fairly and adequately instruct[ed] the jury as to the substantive law in this matter."

6. Petitioner contends (Pet. 29) that on the counts relating to his 1988 and 1989 taxes, he was entitled to increase the basis of the IEM stock he sold, because he had personally guaranteed SBA loans to IEM. The record, however, shows that petitioner was never required to make payments on the loans, which IEM repaid without his assistance. Gov't C.A. Br. 6. Before a shareholder may increase his basis in the stock of a Subchapter S corporation, there must be an

economic outlay on his part; a loan guarantee—which is merely a promise to pay in the future if certain events occur—generally cannot fulfill that requirement. See, *e.g.*, *Harris* v. *United States*, 902 F.2d 439 (5th Cir. 1990); *Estate of Leavitt* v. *Commissioner*, 875 F.2d 420 (4th Cir.), cert. denied, 493 U.S. 958 (1989); *Brown* v. *Commissioner*, 706 F.2d 755 (6th Cir. 1983). Because petitioner has not cited, and we are unaware of, any court of appeals decision indicating that loan guarantees of the sort at issue in this case could have justified an upward adjustment in basis, this Court's review is unwarranted.[9]

---

[9] *Selfe* v. *United States*, 778 F.2d 769 (11th Cir. 1985), is not to the contrary. There, the court concluded that summary judgment for the government was improper where the facts indicated that a shareholder had, in substance, borrowed funds and advanced them to the corporation. Although the court acknowledged that an ordinary loan guarantee will rarely permit a taxpayer to increase his or her basis, it held that there may be circumstances in which a taxpayer may be able to show that the substance of a guarantee is more like a cash outlay from the shareholder to the corporation. 778 F.2d 772-774. Far from holding that loan guarantees always add to a shareholder's adjusted basis, the court recognized that "arguments similar to [the defendant's]—that the taxpayer's guarantee is in reality a loan made to the shareholder/taxpayer that is subsequently advanced to the corporation—usually meet with little success because the taxpayer is unable to demonstrate that the substance of his transaction is different than its form." *Id.* at 774. Because petitioner has pointed to nothing in the record to suggest that his loan guarantee should be treated differently from its form, there is no reason to believe that this case would be decided differently in the Eleventh Circuit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

MICHAEL L. PAUP
Acting Assistant Attorney General

ROBERT E. LINDSAY
ALAN HECHTKOPF
JANET KAY JONES
Attorneys

JULY 1993